JAMES CAPEL (FAR EAST) LTD.

v.

Y.K. FUNG SECURITIES SDN. BHD. & TAN KOON SWAN

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 23-202-86]
22 MAY 1990

CIVIL PROCEDURE: *Taking of evidence outside jurisdiction - Relevance of evidence - Costs incurred.*

The plaintiffs J (stockbrokers) are claiming approximately RM24 million being money due allegedly from defendant Y to J in respect of contracts for purchase of securities and for damages for breach of contract. Y allege that the share transactions were illegal and unenforceable as ultimately, the buyers and sellers were the same persons; Y contends that W1 who was a senior dealer of J know this; W1 denied this in an affidavit filed in connection with an earlier interlocutory application. However W1 was unwilling to give evidence, either orally or by way of deposition.

W2 was a director of another stockbroking firm and a member of the Singapore Stock Exchange. W2 also refused to give evidence as to whether he had dealt with the contracts in question for J.

J applied for a letter of request to the judicial authority in Singapore for the examination of W1 and W2 (both Singapore citizens) on the ground of their refusal to attend trial in Ipoh.

Held:

[1] The evidence of W1 and W2 was relevant; although the case was filed in 1986 and the present application filed only in 1989, having regard to the circumstances, the question of delay could not be held against J.

[2] The absence of the defendant's financial controller would not disrupt the business of the defendant.

[3] In relation to the non-observation of witnesses by the Ipoh High Court if the examination took place in Singapore, the doctrine of necessity could be invoked to prevent a failure of justice.

[Plaintiff's application allowed.]

Cases referred to:
Ehrman v. Ehrman [1896] 2 Ch 611
Cheak Yoke Thong v. PP [1984] 2 MLJ 119

Legislation referred to:
Securities Industry Act 1973 [Sing], s. 14

For the Plaintiffs - N. Chandran; M/s. Adnan Sundra & Low
For the Defendants - Chan Kok Keong (Choo Cheng Lee with him); M/s. Chan & Associates

JUDGMENT

Peh Swee Chin J:

The plaintiffs, have carried on at all material times the business in Singapore of dealing in securities and the defendant, likewise in Ipoh.

The plaintiffs' claim was for RM24,711,985.56 being money due allegedly from defendant to plaintiff in respect of contracts for purchase of securities and for damages for breach of contract etc.

The plaintiffs applied for the issue of a letter of request to the judicial authority in the Republic of Singapore for the examination of 2 witnesses, *viz*. Lau Wai Wook and Kevin Loh, both witnesses being Singapore citizens and out of jurisdiction of this Court, on the ground of their refusal to attend the trial in Ipoh.

It would be necessary to deal with the materiality of the evidence or potential evidence of both the witnesses in reference to issues raised.

First, I deal with the witness viz. Mr. Lau. One of the defences raised by the defendant was that the share transactions were illegal or unenforceable because they were artificial transactions, because in turn, the ultimate buyers and ultimate sellers were the same persons and that Mr. Lau who was then in the employ as a senior dealer of the plaintiff knew this. In an affidavit dated 10 February 1987, filed in connection with some earlier interlocutory application, the said Mr. Lau had categorically denied this and also the allegation that he knew for whom the defendant was acting in these share transactions. Mr. Lau had since left the employment of the plaintiff.

In an affidavit of learned Counsel for the plaintiff, it was deposed that despite repeated requests, the said Mr. Lau was unwilling to give evidence *viva voce* or by way of deposition. A letter from Mr. Lau's Singapore solicitors was exhibited stating that their client would not also make a deposition.

Next, it was Mr. Loh, who was at the material time attached to some other stock broking firm as a director and also a member of Singapore Stock Exchange. He had dealt with the orders for securities in question on behalf of the plaintiff. It was raised as a defence also that, the plaintiff, being the holder of a dealer's licence under s. 14 of the Securities Industry Act 1973 of Singapore, committed a breach of a condition by dealing with securities quoted in the Singapore Stock Exchange by itself instead of dealing with them through a member of the Stock Exchange of Singapore, of which the plaintiff was not a member. The contracts for securities in question were therefore void and unenforceable.

Mr. Loh's evidence, who was a member of Stock Exchange of Singapore had, according to the affidavit the plaintiff's solicitor, dealt with the contracts in question for the plaintiff, and therefore there was no breach of said condition. According to the affidavit of the plaintiff's solicitor, Mr. Loh had also refused to give evidence.

The materiality of the evidence of the above witnesses could not be in doubt, this much appeared to have been conceded to, by implication, by the defence judging from affidavits filed on behalf of the defendant. I was satisfied that they were not willing to attend the hearing in Ipoh, and being persons out of the jurisdiction of High Court, Malaya, they could not be compelled to do so and further their evidence was relevant, (please see *Ehrman v. Ehrman* [1896] 2 Ch. 611). What remained, importantly to be decided was whether the application was *bona fide*.

On the point of *bona fides*, the affidavit of Mr. Phillip Fung Yik Pin, financial controller of the defendant, whose affidavits appeared to be the only ones filed by the defendant, had merely this to say that the case was filed in 1986 and the application was made in 1989. The solicitor of the plaintiff, in his affidavit said that "until very recently", the plaintiff believed that Mr. Lau would be willing to attend Court. I did not think it unreasonable to say that the plaintiff having secured the foreign witnesses' co-operation in the making of their affidavits used in some previous interlocutory proceedings, could have led itself to believe that the foreign witnesses would attend Court. They could have changed their minds or evinced an intention of not going to attend Court subsequently. Nobody would go to a great deal of extra expense and trouble unless compelled to do so or for some improper motive none of which could be found. Having regard to the circumstances, the question of delay could not be held against the plaintiff.

It was not the end of defendant's argument. The defendant further argued that the absence of Mr. Phillip Fung the financial controller, could cause disruptions in the business of the defendant and expenses would be unavoidable, for it would be cheaper for the 2 foreign witnesses to come to Ipoh. I did not think the situation would ever come to anything as close as "disruptions", neither would there be a breakdown in communication between the defendant's staff in Ipoh and him when he was in Singapore. One could imagine that the defendant's team of sub-accountants, book-keepers and cashiers would continue their work without a break; as for expenses, I made another order which will be stated later, to go some way to meeting the requirements of the defendant.

It was further submitted on behalf of the defendant to the effect that if the examination of those foreign witnesses took place in Singapore, the Court in Ipoh would not be able to observe their demeanour. It brought to mind the doctrine of necessity which could be invoked to prevent a failure of justice. Please see *Cheak Yoke Thong v. PP* [1984] 2 MLJ 119 at p. 123, and in somewhat prosaic language, half a loaf was better than none.

I therefore allowed the application of the plaintiff ordering that the costs and expenses incidental to the application, including the costs of the application itself be paid by the plaintiff to the extent of one half thereof, the other half to be costs in the cause. I further ordered that each party to pay such costs and expenses in the first place subject of course to the ½ to be borne by the plaintiff in any event. The effect would enable the defendant to recoup and recover from the plaintiff one half of such costs and expenses later, while awaiting trial.

Also found at [1991] 1 CLJ 541